United States Court of Appeals

for the Second Circuit

APPENDIX

74-1925

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DECEMBER TERM, 1974

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UNITED STATES OF AMERICA,

Appellee,

-against-

DOCKET NO.

74 CR 1925

WILLIAM LEE,

Appellant.

----------X

APPENDIX TO APPELLANT'S BRIEF

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PAGINATION AS IN ORIGINAL COPY

Index to Appendix

D. C. Form No. 100

CRIMINAL DOCKET

JUDGE BRIEANT

73 CRIM. 1007

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	Jerome L. Merin, Sp. Atty.
WILLIAM LEE	264-3935
	For Defendant:

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED					
			DATE	NAME	RECEIVED		DISBURSED	
2)								
Fine,								
Clerk,								
Marshal,								
Attorney,								
T. 18								
Sec. 1623								
erjury while testifying								
efore the Grand Jury.								
(Four Counts)								

DATE	PROCEEDINGS
-73	Filed indictment. (Case assigned to Judge Brieant as related to 72Cr629)
-12-73	Filed affdvt. for W/H/C Ad Test. of AUGUST SMREK. W/issued Ret. 11-15-73.
-12-73	Filed affdvt. for W/H/C Ad Test. of THOMAS STACKUM. W/issued and ret. 11-15-73.
-19-73	ACREL SIMON - Filed affdvt. and order granting immunity. BRIEANT,J.
-19-73	AIGISTIS SMREK - Filed affdvt. and order granting immunity. GAGLIARDI,J.
-19-73	HUMBERT CAPPELLI - Filed affdvt. and order granting immunity. GAGLIARDI,J.

(cont'd on page 2)

UNITED STATES COURT OF APPEALS FILED 1974 DANIEL FUSARO, CLERK SECOND CIRCUIT

APPENDIX EXHIBIT A

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
1-14-73	Deft. (Atty present) PLEADS NOT GUILTY.		
	Jury Trial begun before BRIEANT,J.		
1-15-73	Trial Cont'd.		
1-16-73	Trial Cont'd. Jury verdict as to ct.4, deft. Not GUILTY.		
1-17-73	Trial Cont'd. Jury verdict Guilty on ct. 1; Not Guilty on ct.2, Guilty on ct. 3. P.S.I. Ordered. Sent. adjd. until 1-9-74. Bail of $500. cash cont'd. BRIEANT,J.		
1-15-73	Filed Affdvt. for W/H/C Ad Test. Ret. 11-16-73.		
11-19-73	Filed Stip. that William Blitz called as witness.		
12-7-73	Filed Gov't affdvt in opposition to deft's motion/		
-20-74	Filed U.S.A. response to defts. motion for new trial.		
2-14-74	Filed CJA Form # 21, authorization for transcripts.		
3-21-74	Filed CJA Form # 21, authorization and voucher for transcripts.		
5-15-74	Filed affdvt. of Jerome L. Merin.		
5-17-74	Filed CJA Form # 21 authorization and voucher for transcript. BRIEANT,J.		
6-15-74	Filed CJA Form # 21 authorization and voucher for transcript.		
6-14-74	Filed Memorandum & Order....On Nov. 17,1973, after a four day jury trial, a verdict was returned aquitting deft. on Cts Two and Four, and conicting deft Lee on Cts. One & Three. Timely motions for a judgment of acquittal pur. to Rule 29(c), F.R. Crim.P., and a new trial pur. to Rule 33 were made.....Deft's motions are in all respects denied ...So Ordered..Brieant, J. m/n		
6-14-74	Filed Deft's motion for new trial		
6-14-74	Filed Deft's Brief in support of moltion for new trial.		
6-14-74	Filed Deft's Motion for judgment of acquittal..		

DATE	PROCEEDINGS
6-27-74	Filed Judgment & Commitment - It is adjudged that the Deft is hereby committed to the custody of the Atty General for imprisonment for a period of SIX (6) MONTHS on COUNT 1, ONE (1) DAY on COUNT 3, to run CONSECUTIVELY to the sentence imposed on Count 1. Deft. cont'd on present bail until he posts bail pending appeal fixed in the amount of $500.00. --BRIEANT, J.
7-3-74	Filed CJA Form 23 -- Financial Affidavit.
7-3-74	Filed Deft's Notice of Appeal to U.S.C.A., 2nd Circuit. from the Final Judgment of June 27, 1974. -- Leave to appeal in Forma Pauperis is Granted --BRIEANT, J. (Mailed copy to Deft, and one copy placed in US Atty box.)
7-10-74	Filed transcript of record of proceedings, dated April 30, May 1, 1974.
7-10-74	Filed transcript of record of proceedings, dated November 14, 15, 16, 17, 1973

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By _____
Deputy Clerk

D. C. 109 Criminal & Bankruptcy Continuation Sheet

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

- v - :

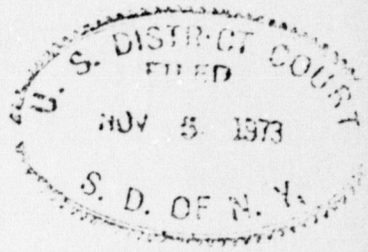
WILLIAM LEE, :

Defendant :

----------X

73 CRM. 1007

INDICTMENT
73 Cr. [illegible]



The Grand Jury charges:

1. On or about the 25th day of April, 1973, in the Southern District of New York, WILLIAM LEE, the defendant, having duly taken an oath that he would testify truly before a grand jury of the United States, duly empanelled and sworn in the United States District Court for the Southern District of New York and inquiring for that District into violations of federal law, unlawfully, wilfully and knowingly and contrary to said oath did make false material declarations as hereinafter set forth.

2. At the time and place aforesaid the grand jury, inquiring as aforesaid, was conducting an investigation into possible violation of United States laws prohibiting conspiracy to defraud the United States (Title 18, United States Code, Section 371), obstruction of State and local law enforcement (Title 18, United States Code, Section 1511), interstate and foreign travel and transportation in aid of racketeering enterprises (Title 18, United States Code, Section 1952) and theoperation of illegal gambling businesses (Title 18, United States Code, Section 1955) and other federal statutes with a purpose of determining whether any persons violated such statutes.

3. It was material to the investigation described in paragraph 2 hereof that the grand jury ascertain facts as to whether defendant WILLIAM LEE, while a member of the City of Newburgh Police Department had received money and envelopes from Allan Handler,

APPENDIX EXHIBIT B

Nellie Mae Lattimore Williams, Earl Boone A/K/A "Pee Wee" Boone, Betty Price and others.

4. On or about April 25, 1973, the defendant, WILLIAM LEE, appearing as a witness under oath before said grand jury, did testify falsely with respect to the aforesaid material matters as follows:

COUNT ONE

1. Q. Did you ever receive any money from Mr. Handler?

A. No, Sir.

Q. Other than money from relatives and money from the employments that you have just mentioned and money from the Police Department, have you received money from any individual?

A. No, I have not.

Q. You are positive of that?

A. I'm positive of that.

Q. Have you received any property of any sort from any people other than employers that you have just mentioned or your relatives?

A. No, I haven't.

* * * * * * * *

[Mr. Friedman]

Q. Has Allan Handler ever handed you money?

A. No, he hasn't.

* * * * * * * *

[Mr. Friedman]

Q. Did Allan Handler ever hand you a bag?

A. No, he didn't.

Q. Did Allan Handler ever hand you an envelope?

A. No, he didn't.

(Title 18, United States Code, Section 1623)

COUNT TWO

Q. Did Mel Williams ever give you money?

A. No, she didn't.

* * * * * * * *

[Mr. Friedman]

Q. Mel Williams has never given you money, is that correct?

A. No, she hasn't.

Q. You are positive of that?

A. I'm positive of that.

(Title 18, United States Code, Section 1623)

COUNT THREE

Q. Did any people pay you bribes?

A. No, they didn't

Q. To the best of your recollection --- I'm sorry, no one has paid you bribes, is that correct?

A. No, they haven't

Q. Do you know Ewell Hanley Boone?

A. I know a Pee Wee Boone.

Q. Peewee Boone

Q. Has he ever picked up money from you?

A. No he hasn't.

Q. Did you ever pick up money from him?

A. No, sir.

(Title 18, United States Code, Section 1623)

COUNT FOUR

Q. On any occasion did you ever tell anyone that you had received money from anyone other than your employers?

A. No, I didn't.

Q. You did not, is that correct?

A. That's correct.

Q. You are positive of that?

A. There would be no reason to tell anybody.

Q. I am asking you whether you are positive of that.

A. Yes, I'm positive of that.

Q. You are positive that you never told anyone that you had received money from anyone other than your employer, is that correct?

A. Yes.

(Title 18, United States Code, Section 1623)

FOREMAN

PAUL J. CURRAN
United States Attorney for the
Southern District of New York

44

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

WILLIAM LEE,

Defendant.

73 Cr. 1007-CLB

MEMORANDUM AND ORDER

Brieant, J.

In a four count superseding indictment filed November 5, 1973, defendant William Lee was charged with knowingly making false material declarations on April 25, 1973 while giving testimony under oath before a federal Grand Jury, in violation of 18 U.S.C. §1623.[1]

The Grand Jury was conducting an investigation into possible violations of various federal laws, including obstruction of state and local law enforcement (18 U.S.C. §1511), interstate and foreign travel and transportation in aid of racketeering enterprises (18 U.S.C. §1952) and the conduct of illegal gambling operations (18 U.S.C. §1955).

Defendant Lee was a member of the Police Department of

APPENDIX EXHIBIT C

the City of Newburgh, New York from February of 1962 until approximately May of 1973. Newburgh is located in Orange County, the area under investigation by the Grand Jury. The questions defendant Lee is accused of having answered falsely related to whether he had accepted money and gifts from individuals reputed to be engaged in illegal activities in Newburgh, such as gambling and prostitution.

On November 17, 1973, after a four day jury trial, a verdict was returned acquitting defendant on Counts Two and Four, and convicting defendant Lee on Counts One and Three. Timely motions for a judgment of acquittal pursuant to Rule 29(c), F.R.Crim.P., and for a new trial pursuant to Rule 33 were made. In support of his Rule 33 motion, defendant alleges that newly discovered evidence requires a new trial. A copy of a signed statement was submitted to this Court made by one Clyde Sawyer, according to which Earl Manley Boone, also known as Pee Wee Boone, a prosecution witness, admitted to Sawyer that he had lied to the Grand Jury. If Boone lied to the Grand Jury, then, inferentially, he also lied at the trial. An evidentiary hearing was held on April 30 and completed on May 1, 1974. Testimony of Sawyer, Boone

and Special Agent Bob C. Reutter of the Federal Bureau of Investigation was received.

Certain questions and answers originally in the indictment were, on defendant's motion, removed from the jury's consideration at the trial. The following allegedly perjurious testimony of defendant Lee in Counts One and Three is all that is before the Court on these motions:

"Count One

1. Q. Did you ever receive any money from Mr. Handler?

A. No, Sir.

Q. Other than money from relatives and money from the employments that you have just mentioned and money from the Police Department, have you received money from any individual?

A. No, I have not.

Q. You are positive of that?

A. I'm positive of that.

Q. Have you received any property of any sort from any people other than employers that you have just mentioned or your relatives?

A. No, I haven't.

Count Three

Q. Do you know Earl Manley Boone?

A. I know a Pee Wee Boone.

Q. Peewee Boone.

Q. Did you ever pick up money from him?

A. No, sir."

Rule 29 Motion

In support of his motion for a judgment of acquittal, defendant contends that the jury's verdict of guilty should be set aside for insufficiency of evidence. Our consideration is controlled by the standard adopted in United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972):

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either

of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter."

There is no dispute that defendant appeared before the Grand Jury on April 25, 1973 and took an oath to testify truly, or that the Grand Jury was authorized by law to administer oaths and was duly empanelled. Attorneys for the Government and for the defendant stipulated to the accuracy of the transcript of the Grand Jury proceedings. Defendant's moving papers do not question the materiality of the testimony sought from the defendant by the Grand Jury, nor could they. The sole issue then is whether, as to each Count of which defendant stands convicted, evidence was presented upon which "a reasonable mind might fairly conclude guilt beyond a reasonable doubt," United States v. Taylor, supra, at p. 243, that William Lee testified falsely, and did so knowingly and wilfully.

Count One

Defendant Lee was charged in Count One with falsely denying that he ever received any money from Allan Handler, a person allegedly engaged in gambling operations in Newburgh, or from anyone other than his employers, friends or relatives.

The Government's first witness was Acrel Simon, who testified that he worked for Handler in Newburgh, picking up numbers from 1968 through 1971 (Tr. p.35). Simon testified that in the summer of 1969 he was stopped by defendant Lee and another policeman. Simon's car was searched. When no numbers or horse action were found, Simon was warned by Lee to be careful, and that he would be watched, because Lee knew he was running numbers. Simon then telephoned his employer, Handler. Defendant Lee never stopped Simon again, nor attempted to arrest him.

In the summer of 1970, Simon met with Handler and one August Sweh, another runner for Handler, who also had picked up numbers and horse action in Newburgh since about 1968 (Tr. p.233). After that meeting, Simon and Handler drove in separate cars to Downing Park in the City of Newburgh, where Lee testified he had been on numerous occasions. Simon there saw Handler drop an envelope into a police car occupied only by defendant. Simon did not see what was in the envelope nor did he overhear any conversation between Handler and Lee.

The inference following from this testimony, that Lee was paid off by Handler, was corroborated by the testimony of

Smrek. Defendant Lee testified that he knew Smrek and believed he had been arrested on various narcotics and gambling charges, although Lee had never arrested him (Tr. p.360-61).

Smrek testified that in late summer or early fall of 1969 he twice met defendant Lee in the parking lot of Smrek's apartment building. On the first occasion, Smrek gave Lee a sealed envelope and told Lee, "This is from Al." (Tr. p.237). Smrek did not recall whether instructions to deliver the envelope were given him by Allan Handler himself, or by Dolores Mitchell. Mitchell worked in Handler's office. She had been arrested by Lee in January 1969 together with Handler for gambling violations. Smrek testified that he later told Handler, "I took care of it for you," (Tr. p.245), referring to the delivery of the envelope. On the second occasion that Smrek saw Lee in the parking lot, he observed a conversation between Lee and Handler which he did not overhear. Smrek had been arrested by other police officers for possession of policy slips.

Lee testified he had known Handler since junior high school, and had investigated and arrested him in January 1969 for involvement in gambling operations. The inference that Handler

made payments to defendant Lee, either himself or through his employees, or gave gifts, would not be unreasonable if the jury, as it apparently did, accepted as truthful, the testimony of Simon and the testimony of Smrek. The jury could reasonably infer from the testimony of these two witnesses that the envelopes delivered to Lee did not contain Bible tracts.

Additional evidence was supplied by Humbert Capelli, former Chief of the Newburgh Police, now serving a New York State penal sentence. Capelli testified that in the fall of 1969, Lee admitted to him that he was accepting money from Handler (Tr. p.171). Capelli also testified that he saw Red Skipwith, who had been arrested on a number of occasions in Newburgh for gambling, give money to defendant Lee. The conversation as related by Capelli was that Lee said: "Red, I m sort of short this week. Can you give me something?" (Tr. p.174). The jury might have inferred this was a loan. However, there is nothing unreasonable in inferring it was not, in view of Red Skipwith's history of illegal gambling activities and in view of the fact that former police chief Capelli himself received money from Skipwith which he testified was not a loan. (Tr. p.182).

tracts

John Maney, another former Newburgh policeman, also admitted receiving money and other gifts from Red Skipwith at Christmas of 1968 and 1969, and testified that the defendant was with him on those occasions, and Maney saw defendant accept money and gifts from Skipwith. (Tr. p.200). Maney further testified that sometime in 1964, defendant Lee told Maney he was "broke" and was going to get some money. Skipwith and Lee met in the parking lot of a bar, while Maney remained in the car. Although Maney did not hear the conversation between Skipwith and Lee, he saw something change hands between them. Later, when Lee and Maney returned to the bar where they had been drinking together, Lee had money.

The third ex-policeman to testify, Thomas Stacklum, stated that on August 23, 1970, he and defendant Lee had a conversation at the Newburgh police station during which Lee said that he had received $100. "from an arrest during the night." (Tr. p.259). Defendant Lee testified that he transported physical evidence related to that arrest, a suitcase full of money, to the police station, that he saw Stacklum that day at police headquarters, but denied the conversation (Tr. p.368-69). During cross-examination

of Stacklum, it was suggested that defendant made this statement jokingly, but the witness denied this.

When Lee took the stand he denied having taken any "bribes", yet admitted "I received moneys, yes; I have." (Tr. p.350).

There was testimony which might have led the jury to believe the testimony of three of the former policemen was motivated by animosity towards the defendant. All three former policemen testified to criminal convictions.[2/] The criminal activities of Smrek and Simon were made known to the jury. The jury nevertheless chose to believe these witnesses, despite their unsavory backgrounds, and this was its prerogative. As very frequently happens, the Government was not in a position to choose more reputable witnesses. The Court cannot substitute its judgment for that of the jury, based on its own opinion of the utterly worthless character of the witnesses, or its evaluation of their credibility. The established rule is that "weighing of credibility is for the jury, not the judge." United States v. Taylor, supra, at p. 245. There was more than adequate credible evidence with respect to Count One. The issues concerning that Count were

tendered to the jury and decided by it. We could not say that its verdict was wrong or unjust.

Count Three

Count Three charged defendant Lee with stating to the Grand Jury, untruthfully, that he never "picked up" money from Earl Manley "Pee Wee" Boone.

At the trial, Boone, a local gambler and self-described "hustler" (Tr. p. 132), testified that in the autumn of 1969 he handed defendant Lee an envelope which he had received from Nell ("Big Nell") Williams, who then kept a brothel in Newburgh.[3/] Boone knew the envelope contained money, because "I seen a $20. bill on top. I don't know how much more there was." (Tr. p.135). And, he said he made the delivery because his fiancee, Betty Price, then worked as a prostitute for Nell Williams.[4/] Defendant testified that he knew both Betty Price and Earl Boone.

As previously pointed out, the jury acquitted defendant Lee of Count Two of the indictment, which charged him with lying about having received money from Nell Williams. As to Count Three, the jury may well have concluded that Boone was a liar, who had

fabricated the whole story. Or, it might have concluded that (through Boone) Miss Price was paying Lee to keep him from interfering with her illicit activities in Basso's Bar, or elsewhere. Or, the jury might have concluded that Boone himself, an admitted "hustler" and gambler with a record, was paying Lee for his own account, and implicating Nell Williams for reasons of his own.

At issue in Count Three is merely whether the Government proved that Lee picked up money from Pee Wee Boone, and knowingly and wilfully testified falsely before the Grand Jury when he denied that he had ever done so. This was the issue tendered to the jury and decided by it. The jury was instructed (Tr. p.439):

> "If you find that any witness has wilfully testified falsely in this trial as to any material fact, you may but you need not disregard the entire testimony of that witness on the principle that one who testifies falsely about one material fact may testify falsely about everything, but you are not required to consider such a witness as totally unworthy of belief. You may accept so much of his testimony as you deem true, and you may disregard what you believe is false."

Obviously, following this instruction, the jury decided

that Boone testified truthfully about delivering money to the defendant, but lied about the source of that money (Nell Williams). The question of credibility, whether to believe all or only a part, and which part of Boone's testimony, was entirely within the province of the jury. If the jury chose to believe that portion of Boone's testimony which led it to convict the defendant, we cannot say its choice was unreasonable.

We conclude that there was sufficient evidence adduced at the trial so that "either of the two results, a reasonable doubt or no reasonable doubt [was] fairly possible", United States v. Taylor, supra, at p.243, and therefore the jury verdict must stand as to Count Three.

Rule 33 Motion

In support of his motion for a new trial, defendant submitted to this Court a handwritten statement dated February 8, 1974,[5/] reading as follows:

> "I, Clyde E. Sawyer, residing at 246 Grant St, Newburgh, NY. do hereby state: That sometime between the indictment and trial of William Lee, I spoke to Earl (Poo Poo) Boone and asked him if 'Billy Lee is a crook'. Boone replied 'I

never give him a dime'. I said 'why are you saying things like that about him' and he said 'Man, they are putting a lot of pressure on my ass and I'm afraid'. I asked 'who they were' and he replied 'the Feds'. I have read the above and it is true."6/

Mr. Sawyer testified the conversation occurred in October of 1973 when Boone came to his office to collect his pay check for some work done for Sawyer. According to Sawyer, he and Boone had another conversation after the trial, in which Mr. Boone again admitted having lied about giving defendant money because of pressures placed on him by "investigators," and expressing his lack of concern about the conviction of a white person based on his untruthful testimony. (Tr.H. p.8-9).*

Mr. Sawyer has been a resident of Newburgh for about 17 years and owns and operates a local house cleaning service. Active in local politics, he is head of an organization known as the Afro-American Labor Council, and belongs to various civil rights organizations. He acknowledged that he is an influential local figure

* References to the hearing held on April 30 and May 1, 1974 will be indicated by "Tr.H.", Transcript of Hearing.

in the sizeable black community of Newburgh. Mr. Sawyer testified that he had known defendant as a police officer for at least ten years, having dealt with him in connection with civil rights matters and Sawyer's work as a paid Youth Adviser for the State of New York. Sawyer and Boone are black; defendant is white. Although defendant and Mr. Sawyer were not openly hostile, Mr. Sawyer testified they "didn't get along too well." (Tr.H. p.10). Past racial relations in Newburgh have been somewhat polarized.

The first time Mr. Sawyer discussed his October 1973 conversation with anyone was about a week after defendant's trial. (Tr.H. p.11). At that time, he and a friend, Tom Poppas, who owns a chain of local hot dog and hamburger stands, were discussing defendant Lee's trial. When Poppas heard about Boone's admissions to Sawyer, Poppas said,

> "You also talk about civil rights and how people treat your people bad and racism and all that... if a white man [is] treat[ed] bad you don't say nothing about it. You just look one way." (Tr.H. p.24).

Mr. Sawyer "thought about it", (Tr.H. p.24), but did nothing. Defendant later met Mr. Sawyer, told him he had heard about the conversation without telling him from whom, and asked if Mr. Sawyer

would give him a statement. (Tr.H. p.13). The written statement set forth above was given shortly thereafter, by Mr. Sawyer when he was visited at his home one evening by an attorney [not defendant's counsel here], defendant and the present Police Chief in Newburgh.

The testimony regarding the date of Sawyer's conversation with defendant, and the date of the statement is somewhat confused, since the statement dated February 8, 1974, according to Sawyer, was given two or three weeks after defendant's trial, or in late December or January. Mr. Sawyer was certain, however, that he did not disclose his conversations with Mr. Boone until after the trial.

At the hearing, Boone testified that he had not lied either to the Grand Jury or at the trial, that the only promise made to him was that "no harm would come to me for testifying in this case," (Tr.H. p.63) and that he had not been threatened or coerced into giving such testimony by federal or state authorities. He stated that he had worked for Sawyer, had been in to pick up a paycheck in the fall of 1973 and had then talked to Mr. Sawyer about the Lee trial. The subject was brought up by Sawyer, and in

response to his questions, Boone said he replied: "I only told the truth, I only answered the questions that I was asked." (Tr.H. p.65). With respect to the second conversation, Mr. Sawyer again asked why Boone had testified against defendant Lee, and Boone replied: "I testified against him because that is what actually happened and that I was asked and I didn't want to perjure myself." (Tr.H. p.66). Boone testified, as Sawyer did, that the first conversation took place in the fall of 1973, between Boone's appearance before the Grand Jury, and the date of trial, and the second conversation took place after the trial.

Defendent's diligence in presenting this evidence in the form of a motion for a new trial, rather than at the trial, is satisfactorily established. Boone testified at trial, and at the post-trial hearing that he has had numerous meetings with representatives of the United States Attorney's Office, New York State police and the Federal Bureau of Investigation during the last two years.[7/] At the hearing, Special Agent Bob C. Fentter testified that Boone said he was reluctant to appear at the trial because he was "afraid ... especially of Nell Williams and other people who he refused to name to us at that time.... He wasn't sure who they

were ... but he just didn't like the whole situation...." (Tr.H. p.118). Mr. Boone stated that he was receiving "protection" from federal authorities, and at the trial said that he had been harrassed by Newburgh police (not including defendant Lee) (Tr. p.157-59) in 1972 and 1973, and had reported this to an agent of the FBI working on the investigation which led to the indictment of this case. It is not at all clear who or what Mr. Boone feared, but it is somewhat difficult to believe it could have been the same "Feds" from whom he sought aid and received "protection." We think he was afraid of Big Bell Williams, and probably Handler.

There is no evidence to support an inference of undue pressure or promises from any government agent and no evidence that the government was aware, before defendant's motion was made, of the statements allegedly made by Boone to Sawyer. This case is, therefore, clearly distinguishable from cases such as United States v. Giglio, 405 U.S. 150 (1972), in which a new trial was granted because the government failed to disclose a promise of leniency made to a government witness, or cases such as United States v. Keogh, 391 F.2d 138 (2d Cir. 1968), where deliberate prosecutorial misconduct was shown, or a case like United States

v. Fried, 486 F.2d 201 (2d Cir. 1973), cert. denied May 14, 1974, 42 U.S.L.W. 3631, in which the government negligently failed to reveal that a government witness had been indicted for a crime similar to the one for which defendant had been indicted. The traditional test applied on motions for a new trial is:

> "The evidence must have been discovered after trial, must be material to the factual issues at the trial and not merely cumulative and impeaching, and of such a character that it would probably produce a different verdict." United States v. Kahn, 472 F.2d 273, 287 (2d Cir. 1973)

Insofar as concerns materiality, Mr. Boone was the only government witness who gave any evidence with respect to Count Three, and therefore his testimony is material beyond dispute. See Mesarosh v. United States, 352 U.S. 1 (1956). In cases dealing with perjury by a government witness, the question is whether the new evidence might have produced a different verdict. See United States v. Silverman, 430 F.2d 106, 119 (2d Cir. 1970), modified on other grounds, 439 F.2d 198, cert. denied, 402 U.S. 953. However, the application of this test is generally limited to cases in which the Court finds proof satisfactory to conclude the witness did in fact perjure himself at trial (see United States v. Silverman, supra).

Mr. Sawyer's testimony is not conclusive evidence that Mr. Boone perjured himself before the Grand Jury and at the trial. That Boone was not a particularly convincing witness is clear from the fact that the jury acquitted defendant of the charge of receiving money from Nell Williams through Boone. Nor could we place much weight or credence on the testimony of Sawyer, whose demeanor and attitude indicated that he was anxious to help Lee and thereby accrue some benefit to himself of a political nature in Newburgh, or ingratiate himself with the present Chief of Police and the unnamed attorney who, it is stated, jointly visited Sawyer's home in the evening for the purpose of eliciting the written statement attached to the motion papers. No suggestion of wrongdoing is intended by this, but the entire situation with respect to Sawyer's testimony casts some doubt upon his veracity. If Boone did in fact make the statements attributed to him by Mr. Sawyer, a point as to which the evidence is by no means clear, then whether they were true is a different and more difficult question. As we have already stated, we find no evidence that any kind of undue pressure was applied by the federal government to Mr. Boone's gluteus maximus, or any other portion of his anatomy. It is more likely, as Mr. Reutter testified, that it was persons in Newburgh whom Boone

feared and reasonably, that his statements to Sawyer were made in an attempt to justify his testimony while avoiding controversy with an influential local figure such as Sawyer.

We find, therefore, that if Mr. Sawyer testified at the trial, the effect of his testimony would have been merely to impeach Mr. Boone's testimony. More than enough evidence already existed in the case to permit the jury to make, as it apparently did, a full and fair evaluation of Boone's truthfulness or mendacity, and Sawyer's testimony, had it been available at the trial, would have offered no more than cumulative impeachment. It is well established that this does not justify granting a new trial. See United States v. Aguilar, 387 F.2d 625, 626 (2d Cir. 1967) and cases cited therein.

Defendant's motions are in all respects denied.

So Ordered.

Dated: New York, New York
June 14, 1974

Charles L. Brieant Jr.
CHARLES L. BRIEANT, JR.
U. S. D. J.

F O O T N O T E S

1. The relevant portions of 18 U.S.C. §1623 read as follows:

> "(a) Whoever under oath in any proceeding before ... any court or grand jury of the United States knowingly makes any false material declaration ... shall be fined not more than $10,000 or imprisoned not more than five years, or both."

2. Ex-police chief Capelli testified that he had been convicted of "tampering with physical evidence, grand larceny second, petit larceny, conspiracy in the third degree" (Tr. p.166). Former police officer Maney testified that he had been convicted of "a class A misdemeanor, petit larceny," (Tr. p.190), and former police officer Stacklum testified that he was then serving a sentence in state prison for "tampering with physical evidence" (Tr. p.258).

3. Big Nell's well known establishment was located next door to the Reformed Church. It also served alcoholic beverages and was a gathering place for local politicians and police who presumably drank Big Nell's liquor free of charge, and discussed their various concerns.

4. In August of 1972 the owner of Basso's Bar in Newburgh complained to defendant that Betty Price had been "in there

trying to hustle customers" (Tr. p.346). As the bar owner and Lee were talking, Miss Price and Boone were outside the bar, about to enter. Defendant Lee then told them if he "caught them hustling" he was "going to bust them." (Tr. p.246). Betty Price testified that she did not recall any such incident at Basso's. Pee Wee Boone's version was that he went to defendant Lee to complain because the bartender at Basso's refused to allow him to enter. The advice he received from Lee was to go home and write a letter of complaint to the state Alcoholic Beverages Control Board. (Tr. p.141).

5. The verdict was returned November 17, 1973. The trial and the resulting verdict received wide notoriety in the city of Newburgh (pop. 26,000). The trial began on November 14, 1973. This is a superseding indictment and the original filing was made on June 27, 1973.

6. The handwriting in this semi-literate statement is that of a member of the bar. See p.16.

7. Apparently all of the meetings were not concerned with the case of William Lee. The trial record showed that Allan

Handler had extensive gambling activities not only in Orange County but in Dutchess County and elsewhere, and Boone was possessed of considerable factual data concerning these activities.

Handler has been convicted before Judge Edmund L. Palmieri of this Court of violating 18 U.S.C. §1623 (false statements relating to gambling activities), 73 Cr. 628.

CHARGE OF THE COURT

THE COURT: Mrs. Morse, Members of the Jury, we are now at that stage in the trial where you will soon undertake your final function as jurors. Here you perform one of the most sacred obligations of American citizenship and that is acting as ministers of justice. You are to discharge this final duty in an attitude of complete fairness and impartiality and, as was emphasized by me when you were first selected, without bias or prejudice for or against the government or the defendant as parties to this controversy.

Let me state the fact that the government as a party entitles it to no greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration. All parties, individuals and government alike, stand as equals before the bar of justice in this Court.

Your final role here is to decide and pass upon the fact issues in this case. You are the sole and exclusive judges of the facts. You determine the weight of the evidence. You appraise the credibility or truthfulness of the witnesses. You draw the reasonable inferences from the evidence and you resolve such conflicts as there may be in the evidence. That is what your job is. I shall later

Appendix Exhibit D

tell you how you determine the credibility of witnesses.

My final function is to instruct you as to the law and it is your duty to accept these instructions as to the law and apply them to the facts as you may find them. You are not to consider any one instruction which I give you alone as constituting the law, but you must consider all my instructions taken together as a whole.

With respect to any fact matter, it is your recollection and yours alone, that governs. Anything the lawyers, either for the government or for the defendant may have said with respect to matters in evidence, whether during the trial, in a question, in argument or in summations, is not to be substituted for your own recollection of the evidence. So, too, anything that I might say during the trial or anything that I might refer to during the course of giving these instructions as to any matter in evidence is not to be taken in lieu of your own recollection.

The attorneys not only have their right but it is their duty to make objections and to press whatever legal theories they may have. They are simply performing their duty here in the trial. Any evidence as to which an objection was sustained by the Court and any evidence ordered stricken out by the Court must be disregarded in

its entirety. Please put out of your mind any exchanges which may have occurred during the trial between the lawyers or between any attorney and the Court. It is not my function to favor one side or the other or to criticise in any way whatsoever or to indicate to you, the jury, in any way that I have any opinion as to the credibility of any witness or as to the guilt or innocence of the defendant. That is your function, yours alone, and I leave it entirely with you so, please do not assume that I hold any opinion in any matters concerning this case and please don't reach any conclusion that I may have some attitude or that I may tend to favor one side or the other in the case. I do not.

Of course, the indictment itself, I told you before, is no evidence of the crimes charged. Instead, an indictment is merely the method or procedure under the law whereby persons accused of crimes by a grand jury are brought into court to have their guilt or innocence determined by a trial jury, such as yourselves. Therefore, the indictment must be given no evidentiary value but shall be treated by you only as an accusation. It is not evidence or proof of the defendant's guilt and no weight whatsoever is to be given to the fact that an indictment has been returned against the defendant. He has pleaded not guilty

and, thus, the government has the burden of proving the charges beyond a reasonable doubt.

A defendant does not have to prove his innocence. On the contrary, he is presumed to be innocent of the accusations contained in the indictment. This presumption of innocence was in his favor at the start of the trial, as I believe I told you before, and the presumption of innocence continued in his favor throughout the entire trial and it is in his favor now and remains in his favor during the course of your deliberations in the juryroom and the presumption of innocence is removed only if and when you, the jury, are satisfied that the government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt.

Of course, unless you are so convinced as to any count in the indictment you must find him not guilty of that count.

Now, the question comes up, naturally, what is a reasonable doubt. Well, members of the jury, these words almost define themselves. That is, a doubt founded on reason, arising out of the evidence in the case or lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence.

Reasonable doubt is a doubt that appeals to

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your reason, to your judgment, to your common sense and your human experience. It is not caprice or whim or speculation or conjecture or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, after a fair and impartial consideration of allthe evidence, you can candidly and honestly say you are not satisfied of the guilt of the defendant, that you do not have an abiding conviction of the defendant's guilt of the particular charge, in sum, if you have such a doubt as would cause you as prudent persons to hesitate before acting in matters of importance to yourselves, then you have a reasonable doubt and, in that circumstance, it is your duty to acquit as to that charge.

On the other and, if after such an impartial and fair consideration of all the evidence with respect to a particular charge you can candidly and honestly say you do have an abiding conviction of the defendant's guilt, such a conviction as you would be willing to act upon in important and weighty matters of the personal affairs of your own life, then you have no reasonable doubt and, under those circumstances, it is your duty to convict.

Reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the

rule, few men, however guilty they might be, would ever be convicted because it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible to mathematical certainty. For that reason, the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

The indictment in this case, members of the jury, contains four counts and each count is a separate charge and they must each be considered separately. You will be asked to give a verdict, a separate verdict on each count of counts 1 through 4, inclusive.

Now, in determining what evidence you will accept and rely upon, you must make your own evaluation of the testimony given by each of these witnesses and determine what you believe to be the truth and the degree of weight you choose to give to that testimony. The testimony of a witnsss may fail to conform to the facts as they occurred because the witness is intentionally telling a falsehood or because the witness did not accurately see or hear what he testified about or because his recollection of the event is faulty or because he has not expressed himself clearly in giving testimony. There is

no magic formula by which you can evaluate testimony.

11x You bring with you into this courtroom today all of the experience and background of your lives. In your everyday affairs, each of you determines for yourselves the reliability of statements made to you by others. The same tests you use in your everyday dealings are the tests which you apply in your deliberation in the juryroom.

You may, of course, consider the interest or lack of interest of any witness in the outcome of this case. A witness who is interested in the outcome of a case is not necessarily unworthy of belief. The interest of a witness, however, is a factor or possible motive which you may consider in determining the weight and credibility to be given to his testimony.

In doing this, you may also consider whether the testimony of a witness is corroborated by the testimony of others which you do believe or by documentary evidence or by exhibits.

You may also consider possible bias or prejudice of a witness, if there be any, and the manner in which the witness gives his testimony on the stand, the appearance and conduct of the witness in giving his answers, the opportunity the witness had to observe the facts concerning

which he testifies and the probability or improbability of the testimony in the light of all the other events in the case.

You may consider whether a witness had a motive to lie. These are all items to be taken into your consideration in determining the truthfulness and weight, if any, which you will assign to the testimony of any particular witness.

If such considerations make it appear that there is a discrepancy in the evidence, you will have to consider whether this discrepancy may be reconciled by fitting the conflicting testimony together of two or more witnesses. If that is not possible, then you will have to determine which of the two conflicting versions you will accept.

If you find that any witness has wilfully testified falsely in this trial as to any material fact, you may but you need not disregard the entire testimony of that witness on the principle that one who testifies falsely about one material fact may testify falsely about everything, but youare not required to consider such a witness as totally unworthy of belief. You may accept so much of his testimony as you deem true, and you may disregard what you believe is false. You, the jury, are

I have made my ruling withdrawing that material from your consideration.

You must disregard absolutely any suggestion whatsoever of illegal conduct on the part of Mr. Lee arising out of that part of the indictment which has been withdrawn and you must restrict your deliberations and your consideration of the evidence which is before you solely to the question of whether or not the government has proved the defendant guilty of the charges in this indictment remaining.

You are not being asked in this trial to determine whether the defendant, Mr.William Lee, was a good police officer or a bad police officer or whether there was or was not illegal gambling and prostitution in Newburgh or whether the City of Newburgh was properly administered, or any of those extraneous issues. You are to pay no attention to those matters whatsoever.

The sole issue before you in this trial is whether or not this defendant, William Lee, knowingly and willfully gave false material testimony to the federal grand jury at the times and in the manner stated in the indictment. In this regard, and in all matters affecting your service as jurors, I am relying on your honesty and sincerity and your im, artiality as jurors that when I give

my directions, they will be adhered to by you.

For your guidance in considering the evidence, I must tell you there are two classes of evidence recognized and admitted in the courts of justice, upon either of which the jurors may find an accused guilty of a crime. One is called direct evidence and the other is called circumstantial evidence.

Direct evidence tends to show the fact in issue without the need for any other amplification although, of course, there is always the question of whether it is to be believed. Direct evidence is what a witness tells you that he or he saw or heard or observed.

Circumstantial evidence is evidence that tends to show facts from which the fact in issue may reasonably be inferred. It is that evidence which tends to prove the fact in issue by proof of other facts which have a legitimate tendency to lead the mind to infer that the facts sought to be established are true.

I will give you a simple example. Sometimes it is difficult to tell, merely by looking out the window, whether it is raining or not, but if you look out the window and see people passing by in the streets and they all have their umbrellas up, you usually come to the conclusion that it is raining. You have direct evidence there, the evidence

of your own eyes, your own senses, that the umbrellas are up and the fact that you see the umbrella are up constitutes circumstantial evidence from which you are entitled to conclude that it is raining.

In other words, circumstantial evidence consists of facts proved from which the jury may infer by a process of reasoning other facts which are in dispute. Circumstantial evidence, if believed, is of no less value than direct evidence because in either case you must be convinced beyond a reasonable doubt of the guilt of the defendant.

I will now read the indictment:

"The grand jury charges:

"1. On or about the 25 day of April, 1973, in the Southern District of New York, William Lee, the defendant, after duly taking an oath that he would testify truly before a grand jury of the United States duly impaneled and sworn in the United States District Court for the Southern District of New York and inquiring for that district into violations of federal law, unlawfully, willfully and knowingly and contrary to said oath did make false material declarations as hereinafter set forth.

"2. At the time and place aforesaid, the grand jury inquiring as aforesaid was conducting an

investigation into possible violation of United States laws prohibiting conspiracy to defraud the United States (Title 18, United States Code, Section 371), obstruction of state and local law enforcement (Title 18, United States Code, Section 1511), interstate and foreign travel and transportation in aid of racketeering enterprises (Title 18, United States Code, Section 1952), and the operation of illegal gambling businesses (Title 18, United States Code, Section 1955), and other federal statutes with a purpose of determining whether any persons violated such statutes.

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"3. It was material to the investigation described in paragraph 2 hereof that the grand jury ascertain facts as to whether defendant William Lee, while a member of the City of Newburgh Police Department, had received money from Allan Handler. Nellie Mae Lattimore Williams, Earl Boone, also known as Pee Wee Boone, Betty Price, and others.

"4. On or about April 25, 1973, the defendant, William Lee, appearing as a witness under oath before said grand jury did testify falsely with respect to the aforesaid material matters as follows:

"Count 1.

"'Q. Did you ever receive any money from Mr. Handler?

"'A No, sir.

"'Q Other than money from relatives and money from the employments that you have just mentioned and money from the Police Department, have you received money from any individual?

"'A No, I have not.

"'Q You are positive of that?

"'A I am positive of that.

"'Q Have you received any property of any sort from any people other than employers that you have just mentioned or your relatives?

"'A No, I haven't.'

"Count 2.

"'Q Did Nell Williams ever give you money?

"'A No, she didn't.

"'Q Nell Williams has never given you money, is that correct?

"'A No, she hasn't.

"'Q You are positive of that?

"'A I am positive of that.'

"Count 3.

"'Q Do you know Earl Manlay Boone?

"'A I know a Pee Wee Boone.

"'Q Pee Wee Boone. Did you ever pick up money from him?

"'A No, sir.'

"Count 4.

"'Q On any occasion, did you ever tell anyone that you had received money from anyone other than your employers?

"'A No, I didn't.

"'Q You did not, is that correct?

"'A That's correct.

"'Q You are positive of that?

"'A There would be no reason to tell anybody.

"'Q I am asking you whether you are positive of that.

"'A Yes, I am positive of that.

"'Q You are positive that you never told anyone that you had received money from anyone other tnan your employer, is that correct?

"'A Yes.'"

That is the indictment.

Now, the indictment charges the defendant with violating Title 18, United States Code, Section 1623, and the pertinent provisions of this statute read as follows:

"Whoever under oath in any proceeding before any grand jury of the United States knowingly makes any false material declaration shall commit a crime."

Simply stated, what the defendant is charged with here is the willful giving of false testimony knowing it to be false as to a material matter before a federal grand jury while under oath, and there are four separate counts or charges accusing him of that crime.

In order to sustain its burden of proof against the defendant under any count of the indictment, the government must establish to your satisfaction beyond a reasonable doubt these five essential elements:

1. That this defendant, William Lee, took an oath to testify truly before a federal grand jury of the Southern District of New York.

2. That the defendant, William Lee, made the statements or gave the answers to questions which are set forth in the particular count of the indictment that you are considering.

3. That the answers as listed in any particular count which you may find were given by the defendant or any one answer in any particular count was false.

4. That the false answer or answers were willfully and knowingly made by the defendant, in that at

the time that he made these statements to the grand jury, he knew the answers were false and intended to lie; and,

5. That the matters or questions as to which it is charged that he gave false answers were material to the issues which were then under inquiry by that grand jury.

Now, in the present case there is no serious dispute that the defendant, William Lee, appeared before a grand jury of the Southern District of New York and that he took an oath before the grand jury to testify truly and that such grand jury was authorized by law to administer oaths and was duly impaneled.

The parties have stipulated, you will remember, that if the court reporter, Mr. Blitz, a man who takes the testimony in a grand jury on a Stenotype machine, as this court reporter is presently doing here today, were called as a witness, he would testify that Exhibit 2 in evidence, which is a transcript, shows correctly the testimony which the defendant, William Lee, actually gave to the grand jury and, accordingly, you may find, based on that exhibit and the stipulation, that he did give the answers charged before the grand jury.

If you believe the testimony of Mr.Filzen, the foreman of that grand jury who testified before you, you must find that the testimony given was material. Mr.

Filzen has testified that the grand jury of which he was then the foreman was investigating gambling, prostitution, corruption and other matters in Orange County, New York, which is where the City of Newburgh is, and all of which is within the Southern District of New York. It is the duty of the grand jury to investigate such matters which may have possible federal ramifications, and may constitute violations of federal penal statutes and any testimony which might give the grand jury a lead in digging out such federal crimes is material, so that I instruct you as a matter of law that the matters about which the defendant testified as set forth in the indictment were material to the issues under inquiry by that grand jury before which the testimony was given and that the grand jury was acting within its rights and powers.

While I have said that these elements were not seriously disputed, nevertheless they must be proven to your satisfaction beyond a reasonable doubt. In view of the evidence which I have just mentioned to you, these elements need not be of concern to you, providing you believe the testimony of the foreman of the grand jury.

There remains for consideration whether with respect to each of the four counts any answer or any part of the testimony given by the defendant as set forth in any

count was false and, secondly, did the defendant give that testimony, if it was false, intentionally and willfully and knowing at the time that it was false. It is enough if the government shows that any part of the testimony cited in the indictment in any particular count is false, if such false testimony was given knowingly and wilfully, and the government need not prove that every answer given in a particular count was false testimony given knowingly and willfully.

With respect to the question of falsity, if the jury finds beyond a reasonable doubt that there has been credible evidence submitted which convinces you that any one element of the defendant's testimony set forth in that count is false, then the requisite quantity and quality of proof has been submitted to you to prove that particular element, the element of falsity, which is one of the five necessary elements of the crime charged.

No particular number of witnesses need testify nor need there be any corroboration of their testimony, so long as you are satisfied of the truthfulness of it and believe that falsity has been proven beyond a reasonabe doubt.

There is no excuse or justification for knowingly testifying falsely before a grand jury, because every

citizen is compelled by law to testify truly under his oath before a competent grand jury.

Knowledge and intent exist in the mind and, since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a conclusion or a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence and to determine from all facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.

As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable or ordinary consequences of his acts.

You will recall that in stating the elements I informed you that before you can convict the defendant of the crime charged in any count of the indictment, you must, as one of the elements, find beyond a reasonable doubt that he acted knowingly and willfully. The statute provides that the defendant is guilty of the crime when he willfully states any material matter which he knows to be false.

I direct your attention to the words knowingly

and willfully, for the question is what do these words mean. Now, there is nothing mysterious or complicated about these words. They do not mean that the government has to show that the defendant knew he was breaking a particular law before he can be convicted of a crime. They do not mean that the government has to show the defendant intended to profit at the expense of the government or anybody else, nor do they have anything to do with his personal or private reasons for violating the statute if, indeed, he did so.

The words knowingly and willfully mean deliberately; they mean intentionally. In other words, knowingly and willfully mean that the defendant made the false statement or false statements with knowledge that the statement or statements were false, that he intended to make the false statement consciously and in the free exercise of his will, as opposed to an inadvertent or innocent or accidental misstatement.

For example, if a defendant, by innocent mistake, made an erroneous or incorrect statement to the grand jury under oath, he would not be guilty of a crime. If he gave testimony that was wrong or false or incorrect or erroneous due to a slip of the tongue or bad memory or through misunderstanding the question, he would not be

guilty of knowingly and willfully making a false statement. But, if at the time the defendant gave the testimony before the grand jury he was aware of the fact that he was making a false statement and if he knew and believed that his statement was false at the time he made it, then he was acting knowingly and wilfully as those terms are used in the statute to which I have previously referred.

An act is done knowingly if it is done voluntarily and purposely and not because of mistake, accident, mere negligence or some other innocent reason. An act is done willfully if it is done knowingly and deliberately.

On the issue of falsity, as in all issues in the case, admissions of a defendant are among the most effectual proofs in the law and constitute the strongest evidence against the party making it that can be given of the facts stated in the admissions. Accordingly, you are entitled to give great weight to the defendant's admissions in the case if you find that such admissions were made.

Now, with respect to the question ofwhether the government has proved falsity beyond a reasonable doubt, I will begin by discussing count 2 first for reasons which the jury will understand in a moment.

With respect to the element of falsity in count

2, the government relies on the testimony of Betty Price to the effect that Nell Williams, also known as Big Nell, waa the keeper of a house of ill repute on Montgomery Street in Newburgh and that the defendant, William Lee, received money from Mrs. Williams in the presence of Betty Price at the house on Montgomery Street.

The government also relies on the testimony of Mr. Boone that he gave money to the defendant, William Lee, from Nell Williams. If you believe Betty Price you may find that the defendant's testimony in count 2 was false and you may also reach the same result if you believe Boone and if you find also that the defendant Lee knew that the money he picked up from Boone, according to the government's contention, in front of Williams' house, was a payment from Williams.

With respect to count 1, which has to do with money from Allan Handler or from any individual, or property of any sort from any persons other than employers and relatives, you may find that the testimony of Mr. Lee before the grand jury was false if you find that he received money or property from Allan Handler or Red Skipwith or anybody other than Mrs. Nell Williams, also known as Big Nell.

Obviously, you could not count money from

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Williams on count 1. You could not consider Money from Williams on count 1, because that is already involved in count 2 and the government cannot have two separate counts based on the same item.-- that is, the claim that Mrs. Williams gave money.

With respect to count 1, the government relies on the testimony as to an incident in Downing Park and testimony as to Red Skipwith giving money as well as the defendant's alleged admissions made to the witness Cappelli and Stacklum and the defendant's own statements he made on the stand here that he did receive money.

14x The defendant contends that the remark about getting $100 as a result of the arrest of the man who was found with the suitcase full of money was made jokingly and that the witness, Stacklum, so admitted on another occasion. This is a matter for your consideration. If one is joking, that cannot fairly be called an admission.

In connection with count 1, you may consider whether envelopes contained or did not contain money or something else and you can consider all the surrounding circumstances and how and under what conditions envelopes were given, if they were given. You may, but of course you need not, infer that it was money in the envelope, but this inference like all inferences following from

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facts, is for you and for you alone.

I do not mean to convey to you any suggestion as to how you should find the facts to be in this case.

In order for the testimony in count 1 to be found false by you, the government must satisfy you beyond a reasonable doubt that this defendant received money from Handler or from persons other than employers or relatives, limited to Skipwith and the person or persons involved in the arrest of the man with the suitcase full of money. Those are the only bases which you may consider in count 1 and you cannot consider Nell Williams in connection with count 1.

Now, there has also been testimony in connection with count 1 as to Christmas gifts and there has been testimony as to money received in 1964. If you are satisfied that he did receive Christmas gifts and that he did receive money in 1964 and he knew that at the time he was asked the questions, then he was obliged to answer truthfully to the grand jury, because the questions were broad enough to encompass those matters.

However, in considering the question of Christmas gifts, and in considering something as far remote in time as 1964, you may consider on the issue of whether he testified knowingly and willfully in a false

manner whether he believed that the Christmas gifts were not included in the question, whether he considered them routine and did not intend to lie concerning them, and you may also consider, in view of the expiration of time, the possibility that he may have failed to remember a transaction nine years prior. These are all matters for your consideration.

However, if you find that the defendant received Christmas gifts and also that he received money in 1964 and that he remembered and knew that when he was asked these questions, then it was his duty to answer affirmatively and when he answered negatively, if he did so intentionally and willfully and was holding back such information from the grand jury which was called for by the questions, these Christmas gifts or the 1964 transaction may constitute a basis for a finding of guilty.

If you fail to find beyond a reasonable doubt that the law has been violated, you should not hesitate for any reason to find a verdict of acquittal but, on the other hand, if you should find that the law has been violated as charged, you should not hesitate, because of sympathy or any other reason, to render a verdict of guilty, as a clear warning that a crime of this character may not be committed with impunity. The

public is entitled to be assured of this.

Under your oath as jurors, you cannot allow any consideration of the punishment which may be inflicted upon the defendant, if convicted, to influence your verdict in any way or in any sense enter into your deliberations. The duty of imposing sentence rests exclusively upon the Court. Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendant solely upon the basis of such evidence and the law.

You are to decide the case upon the evidence and the evidence alone. You must not be influenced by any assumption, conjecture, sympathy or any inference not warranted by the facts until proven to your satisfaction,

There is no duty upon the part of the government to call in witnesses whose testimony would be merely cumulative. You are to decide the case based upon the evidence which is before you and not upon evidence which might have been brought before you.

Specifically, the government had no duty to call Allan Handler as a witness or Nell Williams Lattimore, also known as Big Nell.

As I have explained to you, the defendant has no duty to call any witnesses or bring in any evidence.

However, the witnesses Handler and Williams were equally available to both sides and could be subpoenaed by the government or by the defendant if either of them thought they should do so and, accordingly, no inference follows adverse to anyone from the failure to call anyone else as a witness.

To repeat, the burden of proof beyond a reasonable doubt is on the government. The defendant has no duty to prove his innocence and you are to decide the case on the evidence before you and not on the evidence of somebody who was not brought to court.

The government has called witnesses at this trial who, by their own testimony, admitted being involved in gambling, prostitution and felonies, persons whose moral character is bad. In the prosecution of crime, the government is frequently called upon to use witnesses like these -- often it has no choice -- because the government must rely on such witnesses to transactions as there may be. However, the facts about the witnesses' background and their prior activities of a criminal nature may be considered by you as bearing on their credibility. I am sure you all understand that it does not follow that just because they are persons who have acknowledged participation in criminal or immoral activities they are not capable of giving

truthful testimony of what they testified to. Their testimony, however, should be viewed with great caution and scrutinized carefully:

Was the individual's testimony inspired by any motive of reward or by self-interest or hostility to the defendant so that false or slanted testimony was given against the defendant? If you find that it was, you ought unhesitatingly to reject it. However, if after caution and careful examination of the witness' entire testimony and observing his demeanor on the stand, considering all the surrounding circumstances, you are satisfied that the witness told the truth as to certain events, there is no reason why you should not accept it as credible as to those events and act upon it accordingly, even if you believe that that witness is a person of extremely bad character.

Now, a word about deliberating. Each juror is entitled to his or her own opinion. Each should, however, exchange views with fellow jurors. That is the very purpose of jury deliberations, to discuss and to consider the evidence together, to listen politely and with respect and consideration to the arguments of your fellow jurors, to present your individual views and to consult with one another and reach a verdict based solely and wholly on the

evidence, if you can do so without violence to your individual judgment. Each one, however, must decide the case for himself or herself after consideration with your
15x fellow jurors.

You should not hesitate to change an opinion which you may hold which, after discussion with your fellow jurors, appears erroneous in light of the discussion viewed against the evidence and the law. However, if after carefully weighing all the evidence and listening to the arguments of your fellow jurors, you entertain a conscientious view that is difrerent from the rest, you are not to yield your judgment and give in simply because you are outnumbered or outweighed or outvoted. Your final vote must reflect your individual conscientious judgment as to how the case should be decided.

In order to find the defendant guilty of any count, there must be a unanimous verdict as to that count. I have previously mentioned to you that you will be asked to give four separate verdicts, guilty or not guilty, as to each of counts 1 through 4, inclusive.

In the course of your deliberations you may want to have some part of the testimony read to you. You may find that you are uncertain as to the meaning of some part of the Court's instructions. You may wish to

see an exhibit. Now, in such case, you may send a note to the Court through your foreman. The foreman will deliver the note to the marshal, asking in writing for whatever will clear up any questions you may have.

In communicating with the Court, I should admonish you that you are not to indicate in your note how your vote may then be divided. You are not to tell us that in any note that comes from the jury.

When the jury has reached a unanimous verdict, the foreman will simply tell the marshal that the jury has a verdict. If you ask for a copy of the indictment by a note from your foreman, the indictment will be sent to you, but, as I noted before, the indictment has no bearing as evidence.

Your foreman will be Mrs. Morse, and she will send out a communication from the jury.

Let me state to you, finally, that your oath sums up your duty. That is, without fear or favor to anyone you will well and truly try the issues between this defendant and the government of the United States based solely upon the evidence and the Court's instructions as to the law. It is important to the defendant, it is important to the government.

Now, I am going to excuse the alternates at

this time with the thanks of the Court. I have appreciated your prompt attendance and your attention here and it turns out that we haven't needed you and you are now excused and you will please return to room 109.

At this time, would you swear the marshals.

(Two marshals were sworn.)

THE COURT: Now, members of the jury, I will ask you to remain seated where you are while I confer briefly with the attorneys in the adjoining room to see if there are any additional instructions which they would like to have me mention to you or anything that I may not have covered in my previous statement to you.

In this regard, I ask you not to discuss the case while seated here in the box because there is the possibility that I might find it proper to give you an additional instruction which you may not presently have received, so please remain silent and remain where you are for a few minutes.

Will the reporter and counsel join me inside.

(In the robing room, Court and counsel present.)

THE COURT: Are there any requests for additional instructions?

MR. MERIN: Nothing from the government, your Honor.